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No. 85-21

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENTS

BRYCE REA, JR.
DONALD E. CROSS
REA, CROSS & AUCHINCLOSS
1 Thomas Circle, N.W.
Washington, D.C. 20005
(202) 785-3700

SANFORD M. LITVACK
DONOVAN, LEISURE, NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Attorneys for Respondent Niagara Frontier Tariff Bureau, Inc.

LESTER M. BRIDGEMAN
LOUIS E. EMERY
BRIDGEMAN & URBANCZYK
1112 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 429-9223

Attorneys for Respondent Inter-City Truck Lines (CANADA), Inc.

PETER D. STANDISH
JOEL B. HARRIS
PHILIP A. BYLER
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Respondent TNT Canada, Inc.

DONALD L. FLEXNER *
WM. RANDOLPH SMITH
CLIFTON S. ELGARTEN
PETER K. LEVINE
CAROL L. HEE
CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-5800

Attorneys for Respondent Dominion-Consolidated Truck Lines Ltd.

PETER A. GREENE
CHARLES L. FREED
THOMPSON, HINE AND FLORY
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800

Attorneys for Respondent ICL International Carriers, Ltd.

JOHN W. BRYANT
EAMES, WILCOX, MASTEJ & BRYANT
900 Guardian Building
Detroit, Michigan 48226
(313) 963-3750

Attorneys for Respondent Bondy Cartage, Ltd.

* Counsel of Record

January 3, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Should this Court overrule its decision in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), which was reaffirmed in *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945), was preserved by Congress, and has been cited with approval by this Court and applied consistently by the lower courts for more than sixty years?

STATUTE INVOLVED

The Interstate Commerce Act, as amended, 49 U.S.C. § 10101 *et seq.* (1982) (formerly codified at 49 U.S.C. § 1 *et seq.* (1976)). The relevant portions of the Act are set forth in Appendices B and C.

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NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS

COUNTERSTATEMENT OF THE CASE

A. The Complaints

Two shippers initiated these consolidated antitrust complaints to challenge rates they paid for truck transportation under Interstate Commerce Commission ("ICC") tariffs.[1] The defendants are the Niagara Frontier Tariff Bureau, Inc. ("NFTB"), an ICC-approved collective ratemaking organization, and five Canadian motor carriers who hold operating certificates from the ICC and Canadian regulatory authorities, and who are members of the NFTB.[2]

[1] The plaintiffs will be referred to as Petitioners. The complaints are reproduced in the Joint Appendix ("JA") and will be referred to as the "Square D Complaint" and the "Big D Complaint." Petitioners' Brief will be referred to as "Pet. Brief."

[2] The defendant motor carriers are Bondy Cartage, Ltd., Dominion-Consolidated Truck Lines Ltd., ICL International Car-

Both complaints claim antitrust injury and treble damages on the theory that Respondents' filed rates were excessive, that Petitioners were entitled to lower rates than those Respondents charged based on published tariffs, and that Petitioners' damages are the difference between those hypothetical lower rates and the filed rates they paid.[3] Petitioners seek to toll the statute of limitations in order to claim damages for a sixteen-year period from 1966 into 1981. JA 13, 26.

As Petitioners acknowledge, the rates charged by the Respondent motor carriers were regulated under the Interstate Commerce Act ("ICA"). JA 9, 21. The Act required that the challenged rates be filed with the ICC in published tariffs, not be changed except upon thirty days advance notice, and be "just and reasonable." JA 9, 22. There is no dispute that the rates upon which these treble damage claims are predicated were at all relevant times duly filed under the ICA, and were never set aside, disapproved or nullified by the Commission. Moreover, Petitioners never challenged Respondents' rates or ratemaking before the ICC, or otherwise sought damages or other relief available to shippers under the Interstate Commerce Act.[4]

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riers, Ltd., Inter-City Truck Lines (CANADA), Inc., and TNT Canada, Inc. The defendants will be referred to as Respondents. The information required by Rule 28.1 is set forth in Appendix A to Respondents' Joint Brief In Opposition, as modified by Appendix A to this brief.

[3] Thus, the Square D Complaint alleges that shippers "paid more for motor freight transport . . . than they would have paid in a freely competitive market." JA 13. The Big D Complaint similarly alleges that transportation rates were fixed "at artificial and non-competitive levels" and that shippers "paid substantially higher charges for the carriage of cargo than they would have paid [otherwise]." JA 25-26. *See also* Pet. Brief at 36-37 n.24 (using hypothetical lower rates to calculate the allegedly excessive charge).

[4] Petitioners' substantive allegation is that certain aspects of Respondents' collective ratemaking in the period 1966 to 1981 fell outside the antitrust immunity provided by the Interstate Commerce Act, 49 U.S.C. § 10706 (1982), and therefore amounted to illegal price-fixing under the Sherman Act, 15 U.S.C. § 1 (1982). The complaints allege that Respondents' ratemaking "was not or could not be approved by the ICC" because it did not comport with the "terms of the NFTB agreement" and ICC procedures and it "interfered with" the right of "independent action" protected by the Interstate Commerce Act. Square D Complaint, JA 11-12; Big D Complaint, JA 24-25. Neither complaint alleges that the violation of ICC procedures was "knowing" or "willful," or that the subject matter of the violations was in any respect beyond the jurisdiction of the ICC to consider and remedy.

B. The Decisions Below

This case arises out of the dismissal of Petitioners' damage claims under *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922) and *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945), which hold that Congress intended the comprehensive scheme of shipper rights and remedies in the Interstate Commerce Act to be exclusive where injury and damage are predicated upon regulated rates. In dismissing these claims, the district court recognized that the instant case "essentially focuses on what plaintiffs claim are unjust and excessive rates," and held that "rate determinations are a matter for the ICC and not for the court." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 596 F. Supp. 153, 155-56 (W.D.N.Y. 1984), Petition Appendix ("Pet. App.") at 49a.

The Second Circuit affirmed without dissent. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985), Pet. App. 1a. Writing for the court, Judge Friendly could find no basis for Petitioners' contention that the *Keogh* line of authority had been overruled by any subsequent statutory change or decision of this Court. To the contrary, the Second Circuit found that *Keogh* had been reaffirmed by this Court, consistently applied by the lower courts, and preserved by

Congress, and consequently held that *Keogh* remains good law today. *Id.* at 1356-64, Pet. App. at 19a-36a.

The Second Circuit further recognized that, contrary to Petitioners' repeated characterizations here, *Keogh* does not establish a "blanket" antitrust immunity, but precludes only antitrust damage claims that flow directly from rates subject to the ICA's powers and remedies. *Id.* at 1365-66, Pet. App. at 38a-40a. The rationale is simple: only a claim for damages would require a court to substitute its judgment for the ICC's on the appropriate level of rates and to apply civil sanctions that supersede the plenary authority of the Commission. On the other hand, where the nature of the remedy sought does not require judicial oversight of ICC-regulated rates, *Keogh* does not govern. For this reason, the United States may proceed by way of criminal prosecutions as well as injunction actions directed at the underlying conduct, and shippers may pursue damage claims that do not involve filed rates. Thus, the Second Circuit remanded this case for consideration of possible damage and injunction claims not foreclosed by *Keogh* and the ICA. *Id.*[5]

SUMMARY OF ARGUMENT

Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922), holds that shippers may not use the antitrust laws to attack collaterally rates subject to regulation under the Interstate Commerce Act. A shipper who pays the filed rate, which is the only legal rate under the ICA, and who enjoys the unique statutory protection to assure that such rate is fair and reasonable, does not suffer cognizable antitrust injury. *Id.* at 163. That principle was reaffirmed two decades later in *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945), and held

[5] Petitioners have indicated in subsequent proceedings before the district court that, even if the lower court determinations are upheld, they intend to plead non-*Keogh* damage claims and to seek an injunction upon any remand.

to foreclose an antitrust attack on rates produced by collective ratemaking that, as alleged here, was unapproved, coercive, and outside an express antitrust immunity.

Congress intended the comprehensive scheme of rate regulation in the Interstate Commerce Act to be exclusive. Extra-statutory remedies that affect rates would undermine the basic purposes of the Act and the Commission's ability to regulate transportation charges. Thus, *Keogh* and *Georgia* restrict one antitrust *remedy* to avoid judicial interference with the ICA; those cases do not, contrary to the repeated mischaracterization by Petitioners, immunize any *conduct*, for illegal collective ratemaking remains fully subject to the Justice Department's criminal and civil antitrust enforcement powers. Moreover, shippers are free to challenge excessive rates and rate bureau violations under the ICA, and the Commission possesses potent tools both for controlling excessive charges and for punishing rate bureau infractions. *See ICC v. American Trucking Associations*, 104 S. Ct. 2458 (1984) (*"ATA"*). Thus *Keogh* and *Georgia* reflect a necessary and appropriate accommodation of the ICA rate regulation scheme and the antitrust laws, based entirely on the intent of Congress.

Keogh and *Georgia* have been cited with approval by this Court and consistently applied by the lower courts to bar shipper claims such as this one; they unquestionably govern this case. Nonetheless, Petitioners and the Government urge this Court to overrule itself,[6] not on the basis that Congress has in any relevant way altered the historic scheme of rate regulation in the ICA, but on what can at best be characterized as policy proposals. In

[6] The Brief for the United States as Amicus Curiae Supporting Petitioners ("U.S. Brief") urges this result explicitly; the Petitioners, implicitly. U.S. Brief at 21, 27.

projecting their view of appropriate regulatory policy, Petitioners and the Government ignore this Court's "filed rate" decisions, of which *Keogh* and *Georgia* are an integral part, and the unique considerations underlying that longstanding doctrine. They also ignore the drastic ramifications for congressional policy and judicial administration that would result from overruling *Keogh*.

When Congress enacted the Interstate Commerce Act, it established a scheme of regulatory control over rates that is in fundamental ways antithetical to free market pricing. In return for the certainty and stability of rate regulation under the ICA, shippers and carriers alike have had to surrender the advantages each could have claimed in a "freely competitive market." They have also relied on the ICA, which Congress established as the sole determinant of rate lawfulness. After sixty years of judicial protection of this scheme, it would be manifestly unfair for this Court to reverse course now and grant shippers a retroactive entitlement to the best of both worlds—not only the fair and reasonable rates guaranteed by the ICA, but the still lower rates that might have existed if transportation rates were not regulated by statute. If the historic accommodation between the Interstate Commerce Act and the antitrust laws is to be readjusted, that is a task for Congress.

ARGUMENT

I. THIS CASE HIGHLIGHTS THE PROPER APPLICATION OF *KEOGH* AND *GEORGIA*.

A. *Keogh* and *Georgia* prohibit judicial interference with ICA-regulated rates.

The issue in *Keogh* was whether an antitrust damage remedy is available to a shipper who has paid the legal rate pursuant to the Interstate Commerce Act. The plaintiff, having unsuccessfully challenged rates under the ICA, argued that his rights were not limited to "the protection against unreasonably high or discriminatory rates afforded him by the [ICA]," but that the Sherman Act entitled him to the benefit of "competitive" rates, "still lower, which, but for the conspiracy, he would have enjoyed." *Keogh*, 260 U.S. at 161-62. The Court unanimously rejected this theory, holding that injury and damages caused by the filed rates of common carriers are not legally cognizable under the antitrust laws. *Id.* at 163. *See also McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980) (characterizing *Keogh*).

The Court's holding was based on the fact that Congress intended the legality of filed rates to be determined solely by the ICA. Under the statutory scheme, "[t]he legal rights of shipper as against carrier *in respect to a rate* are measured by the published tariff." 260 U.S. at 163 (emphasis added). Regardless of how the rate was produced, whether by independent or collective action, whether before or after Commission approval, the filed rate is the only legal rate:

> Unless and until suspended or set aside, this rate is made, *for all purposes*, the legal rate, as between carrier and shipper. *The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.*

Id. (emphasis added).[7] The Court therefore concluded that shippers who have paid the filed rates as a matter

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[7] Congress was unequivocal that no carrier may "charge . . . a greater or less or different compensation . . . than the rates . . .

of law have not been "injured" within the meaning of the antitrust laws. *Id.* *See* 15 U.S.C. § 15 (1982) (standing to claim antitrust damages granted to anyone "injured in his business or property").

Beyond the irreducible bar to antitrust standing, the Court was concerned about the threat to the system of rate regulation that the antitrust damage remedy would entail. Rate lawfulness must be determined solely under the ICA, to the exclusion of "the several juries and courts" reaching conflicting results, because "otherwise the paramount purpose of Congress [in the ICA]—prevention of unjust discrimination—might be defeated." 260 U.S. at 163-64. A further "obstacle" was that the plaintiff's measure of damages required proof, not simply of a hypothetical lower rate, but of a lower rate that would pass muster under the ICA. *Id.* at 164. Stressing that it is only the Commission that can make this determination, the Court rejected as impossibly speculative prior referral of the "hypothetical rate" issues to the Commission, and upheld dismissal of the complaint. *Id.*

Thus, Petitioners misconstrue *Keogh* when they state that it represents a "blanket immunity" designed to shield price-fixing agreements from the antitrust laws, Pet. Brief at 25, or that the Court assumed that "joint ratemaking" was in any sense "lawful." *Id.* at 10. To the contrary, the Court acknowledged that such conduct was illegal and remained fully subject to criminal and civil prosecution by the government under the antitrust laws. 260 U.S. at 161-62.[8] It was not the underlying con-

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specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates . . . so specified . . . ." Ch. 3591, § 2, 34 Stat. 584, 587 (1906) (codified at 49 U.S.C. § 6(7) (1976); recodified at 49 U.S.C. § 10761 (1982)). *See also* Ch. 498, § 217(b), 49 Stat. 543, 561 (1935) (codified at 49 U.S.C. § 317(b) (1976)) (identical language applicable to motor carriers).

[8] The Government's contrary view, U.S. Brief at 8 n.9, is belied by the *Keogh* Court's conclusion that the illegality of collective ratemaking under the Sherman Act was already "settled." 260 U.S. at 161-62.

duct, but the nullifying impact the antitrust damage remedy would have on filed rates, that was at issue.

The *Keogh* holding was reaffirmed twenty-three years later in *Georgia*, 324 U.S. at 453.[9] There, the State of Georgia sued in part as a shipper for antitrust damages and injunctive relief based upon a conspiracy among the defendant railroads to charge excessive and discriminatory rates. The allegations differed from *Keogh* in two respects: first, the challenged rates had *not* been approved (or disapproved) by the Commission,[10] and second, those rates were the alleged result of coercion that had restrained independent action. 324 U.S. at 444-45. Nevertheless, upon review of *Keogh*'s reasoning, the Court held that, "from the *Keogh* case alone . . . Georgia may not recover damages even if the conspiracy alleged were shown to exist." *Id.* at 453.

In addition, the Court drew a sharp distinction between injunctive relief directed against the underlying conspiracy and the same relief aimed at the rates that were the product of the conspiracy. As to the former, an injunction would lie against the conspiracy because the Commission then had no regulatory powers over rate agreements; but as to the rates themselves, where the Commission's authority was plenary, the Court barred any form of equitable relief. *Id.* at 454-55. Thus, *Georgia* reinforces the essential nature of *Keogh* as a remedy limitation, not an antitrust immunity.

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[9] *Keogh* was applied in the intervening years in *Terminal Warehouse Co. v. Pennsylvania Railroad*, 297 U.S. 500 (1936). The Court cited *Keogh* as "apposite" support for the proposition that, with one exception not relevant here, the exclusive remedy for claimed discriminatory charges lay in the ICA, not the Sherman Act. *Id.* at 511. The exception covered a conspiracy among carriers to aid the unregulated monopoly of a manufacturer or group of manufacturers, where "the damages [were] being measured not merely by the consequences flowing from the preference [the filed rate], but by those flowing from the conspiracy in all its comprehensive unity." *Id.* at 516.

[10] *See* 324 U.S. at 452, 460 *and Square D*, 760 F.2d at 1356, Pet. App. at 17a.

The principle established in *Keogh* and reaffirmed in *Georgia* has been uniformly applied by the lower courts to bar shipper damages for antitrust claims based on filed rates. The unbroken line of authority includes the Second Circuit's opinion below and three recent decisions by the Seventh Circuit. *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed sub nom. Little Crow Milling Co. v. Baltimore & Ohio Railroad*, 54 U.S.L.W. 3085 (U.S. July 16, 1985) (No. 85-112) [hereinafter cited as "*Wheat Rail*"]; *Minsky v. Auto Driveaway*, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984); *Board of Trade v. ICC*, 646 F.2d 1187 (7th Cir. 1981). In addition, three district courts—from the Third, Ninth and Second Circuits—have applied the doctrine. *In re Lower Lake Erie Iron Ore Antitrust Litigation*, MDL 587, slip op. (E.D. Pa. June 5, 1985), *reprinted in* Respondents' Joint Brief in Opposition, Appendix B at 2a [hereinafter cited as "*Iron Ore*"]; *Asbury Graphite, Inc. v. Dehyco Co.*, 1981-1 Trade Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980); *Monticello Heights, Inc. v. Morgan Drive Away, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,282 (S.D.N.Y. 1974). Moreover, the *Keogh* rule has been frequently cited with approval by this Court.[11]

B. *Keogh* and *Georgia* properly bar the damage claim in this case.

Keogh and *Georgia* squarely control this case, as both the district court and the Second Circuit held. Peti-

[11] *E.g.*, *McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980) (citing *Keogh* for the proposition that inability to prove "legally cognizable damages" limits relief available in an antitrust action); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 299-300 & n.12 (1973); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260 (1972); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 & nn.28 & 29 (1963) (citing *Keogh* as a case in which "plain repugnancy between the antitrust and regulatory provisions" had been found); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963); *United States v. Radio Corporation of America*, 358 U.S. 334, 347-48 (1959); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 483, 485 (1932).

tioners, like the plaintiff in *Keogh*, paid rates contained in published tariffs and subject to ICA standards—rates that, once effective, were never set aside, disapproved, or nullified as unlawful. Petitioners thus received exactly what they were entitled to under the ICA—rates governed by the statutory standards of the Act. In fact, during much of this period, the Commission actively reviewed the rate increases at issue in this case *before* they went into effect to enforce compliance with the Act.[12]

Not satisfied with the "fair" rates guaranteed them by the ICA, Petitioners seek from the courts what amounts to a retroactive award of competitive rates. Their complaints request damages based, not on the filed and regulated rates, but, just as in *Keogh*, on such lower rates as might have prevailed in a "freely competitive market."

[12] Although neither necessary to, nor considered in, the decisions below, the Commission's docket shows that, from January 1974 through December 1982, the NFTB filed 20 general rate increases on behalf of its members, including Respondents. All were reviewed by the ICC before they became effective. In fifteen cases, the Commission permitted the increases to take effect as proposed. *See* ICC Suspension and Fourth Section Board Case Nos. 60260, 61861, 63323, 64468, 65561, 66350, 67251, 68980, 69476, 69868, 70142, 70429, 70554, 70749, and 70912. In three cases the ICC permitted lesser increases than those proposed to take effect. *General Increase, July 1974, Niagara Frontier Tariff Bureau*, Investigation and Suspension Docket No. M-27823; *General Increase, December 1975, N.F.T.B.*, Investigation and Suspension Docket No. M-28866; *General Increase, N.F.T.B., U.S./Canada, April 6, 1981*, Investigation and Suspension Docket No. M-30308. Of the two cases in which the agency conducted formal investigations, one found the increased rates to be just, reasonable and otherwise lawful. *Increased Rates and Charges, N.F.T.B., U.S.A.-Canada, October 1978*, ICC Docket No. 37040, order of March 14, 1979 (unpublished). The other remains pending before the ICC. *Increased Rates and Charges, N.F.T.B., U.S.A.-Canada, April 1978*, ICC Docket No. 36884, *remanded sub nom. National Small Shipments Traffic Conference, Inc. v. ICC*, 737 F.2d 1206 (D.C. Cir. 1984). These general increases are precisely those on which Petitioners propose to base their damage calculations. *See* Pet. Brief at 36-37 & n.24.

Square D Complaint, JA 13. It is precisely this claim that *Keogh* holds is not, and cannot be, "legally cognizable" under the antitrust laws, *McLain*, 444 U.S. at 243 (citing *Keogh*), because the filed rates Petitioners paid, having never been "suspended or set aside" by the ICC, are "for all purposes, the legal rate." *Keogh*, 260 U.S. at 163.[13] It is not a freely competitive market rate to which Petitioners are entitled under the ICA, but the "just and reasonable" filed rate.[14]

Apart from the fact that Petitioners have suffered no legal injury, their damage claim, like the one in *Keogh*, would embroil the courts in the resolution of issues that Congress delegated solely to the expert agency. As a matter of proximate cause, Petitioners could not establish legal injury or damage without proof that any hypothetical lower rate conformed to the requirements of the ICA. *Keogh*, 260 U.S. at 163-64. As *Keogh* recognized,

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[13] As the Commission itself has made clear, an otherwise lawful rate—one that is reasonable and non-discriminatory—does not automatically become a substantively unlawful rate, or the basis of legally cognizable damages, simply because it may be the product of an infraction of rate bureau procedures. *Transit on Wheat Between Reshipping Point and Destination*, 365 I.C.C. 890, 898-901 (1982). Moreover, the Commission's discretion to make that determination was specifically cited with approval by this Court in *ICC v. American Trucking Associations*, 104 S. Ct. 2458, 2468 n.13 (1984) (*"ATA"*).

[14] Petitioners miss the point in arguing that Respondents should be somehow estopped from showing, as a *factual* matter, that no injury can be established because the same rates could have been agreed upon collectively if rate bureau procedures were followed. Pet. Brief at 36-37 n.24. The bar to their damage claim is one of law, not fact. In addition, however, the courts may not estop a defense—that the same rates would have been produced by procedurally-correct ratemaking—for which there is an express statutory immunity. *Cf. In re Wheat Rail Freight Rate Antitrust Litigation*, 579 F. Supp. 517, 535-36 (N.D. Ill. 1984) (recognizing that, if the carriers had abided by the rate bureau agreement, the same rates could have been agreed on and filed), *aff'd, supra* p. 10.

such a determination may require "reconstituting the whole rate structure," a task for the Commission, not the courts. *Id.* at 164.

In an attempt to avoid *Keogh* and *Georgia*, Petitioners argue that their allegations of "unauthorized" conduct are a "far cry" from the situation in *Keogh*, but in so doing distort the holding of those cases. Pet. Brief at 10-11. Neither *Keogh* nor *Georgia* turned on the nature of the underlying conduct, because both decisions recognized that collective ratemaking was then unlawful under the Sherman Act and was fully subject to punishment and redress through government prosecution. *Keogh*, 260 U.S. at 161-62; *Georgia*, 324 U.S. at 458. Indeed, the *Georgia* case, which Petitioners ignore, reaffirmed the *Keogh* rule, *see Square D*, 760 F.2d at 1356, Pet. App. at 17a, and applied it in precisely the circumstances relied on here, namely collective ratemaking alleged to be unapproved by the ICC, to be "coercive" and to be outside an express antitrust immunity.[15] 324 U.S. at 444-45. In short, the fundamental concern in both cases was to protect the integrity of regulated rates, as it is judicial interference with rates, not conduct, that *Keogh* and *Georgia* bar.

Accordingly, the applicability of *Keogh* and *Georgia* to the facts of this case is clear, and Petitioners may proceed only by convincing this Court to overrule these long-standing precedents.

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[15] Under statutory wartime powers, certain activities of railroad rate bureaus had been exempted from the antitrust laws. The Court in *Georgia* noted the existence of this express immunity, but held that it was inapplicable because, *inter alia*, "[i]t [did] not sanction the use of coercion." 324 U.S. at 459 n.7.

II. *KEOGH* AND *GEORGIA* SHOULD NOT BE OVERRULED.

A. As a remedy limitation, *Keogh* implements congressional intent that filed rates be governed exclusively by the Interstate Commerce Act.

1. Keogh *and* Georgia *are part of the longstanding filed rate doctrine, which bars judicial interference with rates subject to the ICA.*

A fundamental flaw in the arguments advanced by Petitioners and the Government, and in the commentary of the court below, is the treatment of *Keogh* as an isolated event based upon static logic, rather than as an integral part of the longstanding "filed rate" doctrine.[16] That doctrine "has its origins in this Court's cases interpreting the Interstate Commerce Act, . . . and has been extended across the spectrum of regulated utilities." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (citations omitted). *Keogh* and *Georgia* stand as part of this jurisprudence, which "forbid[s] judicial intrusion into the administrative domain" with respect to rates regulated under the ICA, *Arrow Transportation Co. v. Southern Railway*, 372 U.S. 658, 670 (1963), whether the threat of such intrusion emerges in the form of common law damage actions, antitrust damage actions, or injunction actions.

The progenitor of the filed rate doctrine is *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), which held that, by establishing a comprehensive scheme of rate regulation in the Interstate Commerce Act, Congress intended to bar damage actions challenging regulated rates under the common law. The opinion recognized that "repeals by implication are not favored" and that such repeals are only appropriate where recognition of the pre-existing right would render the new statute "nugatory." *Id.* at 437. Nonetheless, the Court concluded that the statutory scheme would be

[16] Neither the Second Circuit's opinion nor Petitioners' Brief refers to the filed rate cases discussed here.

frustrated if shippers were permitted to challenge rates through extra-statutory theories, and therefore reversed the judgment for the plaintiff.

This basic principle has been applied and extended over time. Indeed, next in development were the cases that confronted challenges to filed rates in the antitrust context: *Keogh* in 1922, which relied on *Abilene Cotton Oil*, *see* 260 U.S. at 164, and then, in succession, *Terminal Warehouse Co. v. Pennsylvania Railroad*, 297 U.S. 500 (1936), and *Georgia* in 1945. Slightly more than a decade later, *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959), held that, even absent a statutory reparations remedy applicable to motor carriers, the ICA defined the full extent of shipper remedies, and the United States as a shipper could not maintain a damage action for unreasonably high rates.[17] Soon thereafter, this Court precluded the entry of orders that would affect not only the level, but the *timing* of regulated rates, in recognition of the "close nexus" between the exclusivity of the ICA's suspension remedy and the principle barring extra-statutory damage actions. *Arrow*, 372 U.S. at 668. This doctrine has been reaffirmed consistently since *Arrow*, and was recently extended to include the proposition that, even where an appellate court has properly vacated an ICC order, it does not possess authority to reinstate the pre-existing rates. *Burlington Northern Inc. v. United States*, 459 U.S. 131, 142 (1982).[18]

[17] The Interstate Commerce Act was amended by the Motor Carrier Act of 1965 to create a statutory reparations remedy applicable to motor carriers. Pub. L. No. 89-170, 79 Stat. 648. Subsequent attempts by the United States and by a private shipper to assert a right to restitution were rejected on the authority of *T.I.M.E. United States v. Associated Transport, Inc.*, 505 F.2d 366 (D.C. Cir. 1974); *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974).

[18] As the Court stated in *Burlington Northern*:

> the Court of Appeals did that which we have said a federal court may not do: *i.e.*, freeze the rate that railroads charge

As developed over time, the filed rate doctrine rests upon three fundamental premises, each of which reflects this Court's interpretation of legislative intent. First, Congress intended that the ICA standards governing rate lawfulness be consistently applied by a single agency rather than be subject to conflicting decisions by the courts. To allow judicial attacks would lead to "the absolute destruction of the Act and the remedial provisions which it created" by undermining the duty that "the statute casts upon [the ICC] of seeing to it that the statutory requirement as to uniformity and equality of rates is observed." *Abilene Cotton Oil*, 204 U.S. at 440-41. *See also Keogh*, 260 U.S. at 163. Requests for judicial relief that require the court to give "some consideration" to the question of rate lawfulness under the ICA are barred, because the prospect of conflicting results is "hazardous to [the] uniformity" Congress sought in the ICA. *Arrow*, 372 U.S. at 670-71. *See also Keogh*, 260 U.S. at 163-64. Therefore, the application of ICA standards, such as rate reasonableness, must be left exclusively to the Commission, for the courts have *no* competence on such questions. *See T.I.M.E.*, 359 U.S. at 473-74. *See also Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (relying on *Abilene Cotton Oil* for the proposition that "rate regulation was within the exclusive jurisdiction of the Commission").

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shippers prior to a decision by the Commission as to what a reasonable rate should be. That approach undermines the Commission's ability to exercise the primary jurisdiction delegated to it by Congress to insure equitable and uniform rates.

459 U.S. at 142. *See also Consolidated Rail Corp. v. National Association of Recycling Industries*, 449 U.S. 609, 612 (1981) ("when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission"); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 698-99 (1973); *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 817-21 (1973).

Second, the filed rate doctrine fulfills the statutory goals of the ICA by avoiding the imposition of extra-statutory remedies that would derogate from the delicate balance struck by Congress. Thus, injunction orders affecting the timing of rates are forbidden because such relief "would interfere with the careful way in which the Commission's suspension power takes into account the need of the carrier to receive a reasonable rate of return, and the desire of the shipper to pay only what is lawful." *Burlington Northern*, 459 U.S. at 139. *See also Arrow*, 372 U.S. at 664. Moreover, as to damage actions that challenge the level of rates, Congress did not intend to provide for additional remedies that may be inconsistent with the regulatory scheme. *See Keogh*, 260 U.S. at 162.

Finally, contrary to Petitioners' suggestion, the application of the doctrine does not turn on a particular perception of where the equity may lie between shippers and carriers. Congress has provided comprehensively for the interests of both shippers and carriers, and this Court has recognized that it is not for the judiciary to upset that balance. *T.I.M.E.*, 359 U.S. at 479-80.[19] Nor does the doctrine mean that damage and injunction actions may be heard by the courts so long as certain issues are referred to the ICC, for just such a proposition was rejected in both *Keogh*, 260 U.S. 163-64, and

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[19] In *T.I.M.E.*, the Court, pointing to various provisions of the ICA that tilt decidedly in the shipper's favor, flatly rejected the suggestion that denying shippers an extra-statutory remedy would be "to sanction injustice":

> Congress has in the Motor Carrier Act apparently sought to strike a balance between the interests of the shipper and those of the carrier, and . . . the statute cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect, at least so long as they were within the "zone of reasonableness."

359 U.S. at 478-79.

T.I.M.E., 359 U.S. at 474-75.[20] The outcome-determinative issue is not judicial balancing of equities or procedural deference to agency expertise, but congressional intent that ICA remedies be *exclusive* as to rates. *Arrow*, 372 U.S. at 667; *Keogh*, 260 U.S. at 162.

2. *The filed rate doctrine is essential to implement legislative intent.*

Analysis of the Interstate Commerce Act, its history and its purposes, confirms that *Keogh* and the filed rate cases correctly interpreted and applied a congressionally-mandated scheme of rate regulation unparalleled in its pervasiveness. In fact, the ICA represents a comprehensive statutory system designed by Congress to substitute government rate regulation for the unrestrained pricing characteristic of a "freely competitive market."

The rate regulation powers delegated to the ICC, as strengthened by Congress over time, and as fully applicable to Respondents' rates not only during the period covered by the complaints, but even today, are plenary.[21]

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[20] *See also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). There the Court held that a state court could not entertain a breach of contract action where the damage claim depended upon an impermissible "assumption that the higher rate respondents might have filed with the [Federal Power] Commission was reasonable." *Id.* at 580.

[21] Congress progressively strengthened the ICA's rate powers in a series of statutes enacted between 1887 and 1948. *See* the Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887) (creating the ICC, the standards of rate reasonableness and non-discrimination, and the tariff filing system); the Elkins Act, ch. 708, 32 Stat. 847 (1903) (imposing criminal penalties for any departure from published tariffs); the Hepburn Act, ch. 3591, 34 Stat. 584 (1906) (authorizing the ICC to prescribe maximum rates on its own initiative and strengthening the ICC reparations remedy); the Transportation Act of 1920, ch. 91, 41 Stat. 456 (empowering the ICC to set minimum rates and oversee the orderly development of a national transportation system); the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (extending the plenary rate powers to motor carriers); the

All rates must meet two independent legal standards, one prohibiting unreasonably high or low rates and the other barring rates that unjustly discriminate among shippers. 49 U.S.C. §§ 10701, 10741 (1982).[22] To enforce these standards, the ICC is empowered, either upon complaint of a shipper or a carrier, or on its own motion, (1) to investigate rates, (2) to suspend proposed rates, thus postponing their effective date pending investigation, (3) to invalidate non-complying rates, and (4) even to prescribe a particular lawful rate. *Id.* at §§ 10704, 10708. Shippers may invoke these remedies to challenge existing and proposed rates, and to seek reparations for having paid excessive rates in the past. *Id.* at § 11705(b)-(c).

Central to the working of the regulatory scheme is the tariff system. All rates must be filed in published tariffs and maintained with the ICC. "[A]ny kind of departure from the published rates" is made a crime,[23] and no rate

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Transportation Act of 1940, ch. 722, 54 Stat. 898 (establishing the national transportation policy that directed the ICC to balance shipper and carrier needs in the public interest); *and* the Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948) (authorizing the ICC to oversee collective ratemaking activities and to grant express immunity for such activities). Between 1948 and 1980 there were only two minor amendments to the portions of the ICA governing motor carriers, neither of which affected the rate powers at issue in this case. *See* the Motor Carrier Act of 1965, Pub. L. No. 89-170, 79 Stat. 648; the Transportation Act of 1958, Pub. L. No. 85-625, 72 Stat. 568. Amendments affecting the railroad industry obviously are not applicable here, and, as discussed below, the Motor Carrier Act of 1980 preserved all of the ICA rate regulation powers that lie at the heart of *Keogh* and *Georgia*. *See infra* pp. 32-33 & note 48.

[22] The "principal thing aimed at" in the statute was to foster price uniformity by prohibiting discrimination. *Houston, East & West Texas Railway v. United States*, 234 U.S. 342, 356 (1914). *See also American Trucking Associations v. Atchison, Topeka & Santa Fe Railway*, 387 U.S. 397, 406 (1967).

[23] *United States v. Braverman*, 373 U.S. 405, 406 (1963).

can be changed without advance notice. *Id.* at §§ 10761-62, 11903 (1982). Congress imposed a rigid tariff filing requirement because it is the key to self-enforcement: armed with notice of all existing rates and of proposed rate changes, shippers can enforce the ICA guarantees of reasonable rates, of equal treatment and of protection against surprise changes. Because of its importance, the filed rate is considered immutable: "tariffs bind both carriers and shippers with the force of law." *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939).[24] The purpose is "to secure uniformity of treatment to all" by requiring that filed "rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed." *Kansas City Southern Railway v. C.H. Albers Commission Co.*, 223 U.S. 573, 597 (1912).[25]

This comprehensive scheme of rate regulation was the product of two related congressional purposes, the first of which was to substitute government regulation for unfettered price competition. Initially, Congress was concerned that railroads in many cases had the market power to charge unreasonably high rates, that competition could not be relied upon "to secure the shipper against abuse and unjust discrimination," and that there-

[24] *See also A.J. Poor Grain Co. v. Chicago, Burlington & Quincy Railway*, 12 I.C.C. 418, 421-23 (1907) ("when once lawfully published, a rate, so long as it remains uncanceled, is as fixed and unalterable . . . as if that particular rate had been established by a special act of Congress").

[25] *See also Robinson v. Baltimore & Ohio Railroad*, 222 U.S. 506, 509-11 (1912) (for a court to award damages based on filed rates "would be destructive of the uniformity and equality which the act was designed to secure" and would present the "confusing anomaly . . . of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate, obilgatory upon both carrier and shipper").

fore regulation was necessary to protect shippers.[26] Congress subsequently concluded more broadly that free competition by railroads was inherently destructive and incapable of serving the long term interests of carriers, shippers and the public in a sound and adequate system.[27]

This legislative purpose was clearly reflected in the 1920 amendments, which empowered the ICC to prescribe minimum rates, thus preventing carriers from competing away necessary profits. Ch. 91, 41 Stat. 456 (1920).[28] The same goal was again evident when the Act was extended in 1935 to include motor carriers:

> competition has been carried to an extreme which tends to undermine the financial stability of the carriers. . . . The present chaotic transportation conditions are not satisfactory.

[26] S. Rep. No. 46, 49th Cong., 1st Sess. 176 (1886). *See also* H.R. Rep. No. 591, 59th Cong., 1st Sess. 2, 5 (1906) (legislation extending ICC power to prescribe a maximum reasonable rate based in part on shipper complaints that rail rates are too high).

[27] *See Petroleum Between Washington, Oregon, Idaho, and Montana*, 234 I.C.C. 609, 637 (1939) ("reasonable prosperity for the carriers is in the final analysis to the advantage of those whom they serve"), *aff'd sub nom. Scandrett v. United States*, 32 F. Supp. 995, 1000 (D. Or. 1940) (upholding ICC decision that proposed rates, though compensatory, would not yield a fair return), *aff'd mem.*, 312 U.S. 661 (1941).

[28] *See, e.g.*, 58 Cong. Rec. 8317 (1919). *See also Dayton-Goose Creek Railway v. United States*, 263 U.S. 456, 478 (1924) (the effect of the 1920 Act was to put the transportation industry "under the fostering guardianship and control of the Commission" in order to "build up a system of railways"); *Texas & Pacific Railway v. Gulf, Colorado & Santa Fe Railway*, 270 U.S. 266, 277 (1926) ("competition between carriers may result in harm to the public as well as in benefit"); *Anchor Coal Co. v. United States*, 25 F.2d 462, 471-72 (S.D.W. Va. 1928) (the ICC may prescribe minimum rates "to guarantee reasonable earnings, not only to the carriers affected, but also to competing carriers, who may labor under a higher cost of doing business").

S. Rep. No. 482, 74th Cong., 1st Sess. 2 (1935).[29] This view carried forward to 1940, when Congress enacted the National Transportation Policy ("NTP"), which included as one objective the avoidance of "destructive competitive practices." Ch. 722, § 1, 54 Stat. 898, 899 (1940) (*codified at* 49 U.S.C. § 10101(a)(1) (1982)). And this same intent was reflected in the legislative history of the 1948 Reed-Bulwinkle Act, when the regulatory scheme was being strengthened to include ICC control over collective ratemaking as well as over the rates themselves:

> in the field of transportation important objectives of the antitrust laws are achieved by means of Government regulation. For example, the antitrust laws are designed to protect the public from unreasonable and excessive prices or unduly limiting production. But resort to such laws is not necessary for that purpose in the case of common carriers because the objective of reasonable prices is achieved by other means, that is, by clothing governmental authorities with the power to fix reasonable rates and charges.

S. Rep. No. 44, 80th Cong., 1st Sess. 4 (1947). In short, Congress determined that free competition would be destructive to the long-run public interest in maintaining an economically-sound transportation system, and that the plenary powers of the ICA were necessary to produce the uniform, reasonable, and non-discriminatory rates that free competition could not.[30]

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[29] *See also Carla Ticket Service, Inc., Broker Application*, 91 M.C.C. 721, 722 (1962) ("The fundamental and original purpose underlying the economic regulation of motor carriers was to protect the public from the damaging effects of ruinous competition among carriers. Such regulatory concept derives its validity from the public utility characteristics of the transportation industry. . . ."), *rev'd on other grounds*, 94 M.C.C. 579 (1964). *See generally* M. Fair & E. Williams, *Economics of Transportation* 487-89 (rev. ed. 1959).

[30] The contrast between the regulatory scheme and the price competition characteristic of a free market has been repeatedly

The second, related purpose of regulation was to allow the ICC, as a "central planner," to strike the necessary balance between shipper and carrier interests. The National Transportation Policy, which was enacted to guide the ICC's administration of the Act, codified this concept in specific regulatory goals. Thus, the statute required balancing the shippers' interest in "the establishment and maintenance of reasonable charges for transportation services" against the promotion of "sound economic conditions" necessary to allow carriers to provide "safe [and] adequate . . . service." 49 U.S.C. § 10101(a)(1) (1982). To foster the orderly development of the transportation system, and to make these trade-offs "in the public interest," required a single nationwide authority:

> under these circumstances it becomes apparent that some tribunal must be empowered with the authority to determine into what particular niche each form of transportation is best fitted, and to discourage other forms of transportation from entering therein.

S. Rep. No. 433, 76th Cong., 1st Sess. 3 (1939).[31]

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recognized by Justice Department officials. *See, e.g., Oversight of Freight Rate Competition in the Motor Carrier Industry: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 1st and 2d Sess. 5-12 (1977-78) (statement of Assistant Attorney General Shenefield). *See also Economic Regulation of the Trucking Industry: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess., Parts 4 and 5, at 1340, 1589 (1979-80).

[31] For over 50 years, the ICC used its regulatory authority over rates to fulfill the public interest in a sound transportation system by protecting carriers from destructive competition. *See, e.g., Import and Domestic Rates on Vegetable Oils*, 78 I.C.C. 421, 427-28 (1923) (proposed rail rate reduction disallowed because it amounted to "destructive competition"); *Rockne Bros.-Commodities Between Sioux City, Iowa, and South Dakota*, 19 M.C.C. 739, 741 (1939) (refusing to allow a rate reduction because to do so would be "inconsis-

To fulfill these purposes, Congress created special standards and remedies, foreign to the free market notions that underlie the damage theories in this case. Congress intended this regulatory scheme to govern the structure, level and timing of rates, and to preclude "judicial intrusion into the administrative domain." *Arrow*, 372 U.S. at 670. From 1907 to 1982, the Court's filed rate cases, including *Keogh* and *Georgia*, recognized this fundamental maxim.

3. Keogh *accommodates the congressionally-recognized interests.*

In this context, *Keogh* and the filed rate cases properly assess and accommodate the congressionally-recognized interests, not merely those implicated by collective ratemaking, but, as well, the carefully-balanced interests of carriers and shippers embodied in the ICA rate powers, which Petitioners and the Government never mention.[32]

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tent with our duty . . . to foster sound economic conditions in the motor-carrier industry"); *Paper Articles Ratings, Illinois Freight Association*, 10 M.C.C. 329, 332 (1938) (cancelling a "competitive" rate reduction because it would "break down the existing rate structures"); *Alcoholic Liquors from Ohio, Indiana, and Kentucky to St. Louis*, 49 M.C.C. 703, 707-08 (1949) (rate reductions disallowed because not compensatory); *Motor Vehicles, Kansas City and Valley Park, Mo., to Southwest*, 332 I.C.C. 615, 625-26 (1968) (reduced rates disapproved where they would result in "needless dissipation" of carrier revenue); *Foodstuffs, from Florida to Ohio*, 355 I.C.C. 773, 777 (1977) ("It is the duty of the Commission to promote adequate and economical service while fostering sound economic conditions in transportation.").

[32] Petitioners, like the Government, see the issue solely in antitrust immunity terms, and thus ignore all interests except those involved in the trade-off between individual and collective ratemaking. Pet. Brief at 17; U.S. Brief at 20-21.

Keogh works no injustice on shippers, for the bar to antitrust damages does not impair their rights under the ICA to obtain reasonable and non-discriminatory rates.[33] As described above, Congress in the Interstate Commerce Act gave shippers not only the guarantee of a "fair" rate, but special rights and remedies far greater than those enjoyed by ordinary customers in unregulated markets. Customers under an antitrust regime are *not* entitled, for example, to know what their competitors are paying or to advance notice of proposed price changes and an opportunity to challenge them.[34] Shippers have these rights under the ICA, together with a panoply of remedies that includes having unlawful rates set aside, reparations awarded and a new rate prescribed that is not discriminatory or too high.[35]

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[33] Petitioners assert that "[d]isadvantaged shippers are unable to obtain effective relief from the ICC" because "the ICC reviews 'only a random sampling of tariff filings.'" Pet. Brief at 12-13. Petitioners fail to note, however, that disadvantaged shippers may themselves compel review by invoking the procedures and remedies of the Interstate Commerce Act any time they believe that they have been charged an unreasonable or discriminatory rate. *See* 49 U.S.C. §§ 10704(f), 11701 (1982). Moreover, the *ATA* Court expressly noted that, prior to 1979 (i.e., for 13 of the 16 years involved here), "the Commission's staff examined every filing prior to the effective date of the proposed tariff and, if an obvious defect was discovered, the tariff was rejected immediately." 104 S. Ct. at 2463 n.4. And of course, as a result of *ATA*, shippers may seek overcharge awards for substantial violations of rate bureau procedures. *Id.* at 2467. *See infra* p. 34.

[34] Antitrust policy values secret discounting, particularly in concentrated markets, and any efforts by competitors to forestall or "regulate" such competition through the exchange of current or future price information can violate the civil and criminal provisions of the Sherman Act. *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *United States v. Container Corporation of America*, 393 U.S. 333 (1969).

[35] In contrast, customers have no right under the antitrust laws to challenge a "monopoly" price, for those laws condemn only mo-

Keogh and *Georgia* also preserve incentives to comply with rate bureau procedures, for as recognized in those decisions, the Justice Department is free to pursue antitrust enforcement through criminal or civil prosecutions where the evidence warrants.[36] In addition to the prosecutorial powers of the United States, there are also the ICC's enforcement powers, which have grown since 1948 and remain untouched by *Keogh*. Those powers include withdrawing antitrust immunity from rate bureaus that breach Commission regulations and, today, imposing retroactive tariff nullification, the "harsh" new remedy for substantial rate bureau violations that this Court approved in *ATA*. Thus, by narrowly restricting a single antitrust remedy, *Keogh* and *Georgia* vindicate congressional intent that ICA standards and remedies alone govern rates, but do so without affecting shipper rights under the ICA or government enforcement tools.

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nopolization, not the exercise of lawfully-obtained monopoly power. *See United States v. Aluminum Company of America*, 148 F.2d 416, 429-30 (2d Cir. 1945). Moreover, the courts have long abjured price reasonableness issues under the antitrust laws. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-98 (1927).

[36] It is disingenuous to argue that *Keogh* creates an incentive to violate the terms of rate bureau agreements, U.S. Brief at 21, when to do so would be to risk criminal penalties of three years incarceration and fines of up to $100,000 for individuals and $1,000,000 for corporations. 15 U.S.C. § 1 (1982). Moreover, government enforcement has been successful in the cases to which *Keogh* has been subsequently applied to bar antitrust damages. The *Iron Ore*, *Minsky* and *Monticello Heights* cases were all subjects of criminal antitrust prosecutions for rate bureau violations. *See United States v. Bessemer & Lake Erie Railroad*, 717 F.2d 593 (D.C. Cir. 1983); *United States v. Auto Driveaway Co.*, 1981-2 Trade Cas. (CCH) ¶ 64,380 (D.D.C. 1981) *and United States v. Morgan Drive Away, Inc.*, 1974-1 Trade Cas. (CCH) ¶ 74,888 (D.D.C. 1974). This case followed a government civil action and entry of injunctive relief, *United States v. Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. 1984), and the defendants in *Georgia* also faced an injunction action.

In sum, Petitioners and the Government carry a heavy burden in seeking reversal of established precedent. They must overcome not simply sixty years of established law represented by *Keogh* and its progeny, but the entire filed rate jurisprudence of this Court, the congressional intent on which all of those decisions rest, and the sensible accommodation of congressionally-recognized interests that follows. Rather than meeting these considerations head-on, however, Petitioners and the Government challenge the continuing "need for" *Keogh*.

B. The "need for" *Keogh* has not changed.

1. *The Reed-Bulwinkle Act of 1948 did not "supplant" the* Keogh *principle.*

In the Reed-Bulwinkle Act of 1948, Congress officially sanctioned collective ratemaking by common carriers. As the legislative history reflects, collective ratemaking organizations were considered by carriers, shippers and the ICC to be practical necessities for the carriers to comply with the rate standards of the Interstate Commerce Act.[37] Therefore, in response to Justice Department antitrust prosecutions of rate bureaus and this Court's decision in *Georgia* to allow an injunction action to proceed,[38] Congress delegated to the ICC the authority to approve the

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[37] For example, the Senate Report stated:

> It is recognized by all who are familiar with the problems of transportation that the carriers subject to the Interstate Commerce Act cannot satisfactorily meet their duties and responsibilities thereunder, and the basic purposes of that act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent.

S. Rep. No. 44, 80th Cong., 1st Sess. 6-7 (1947).

[38] *United States v. Association of American Railroads*, 4 F.R.D. 510 (D. Neb. 1945); *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945).

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organization and operation of rate bureaus, to confer antitrust immunity with such approval, and to supervise collective ratemaking conduct.[39]

The centerpiece of Petitioners' Brief is the argument that passage of the express antitrust immunity provision in the Reed-Bulwinkle Act obviated any further need for the *Keogh* doctrine. Pet. Brief at 16-33. This argument proceeds from the erroneous proposition that *Keogh* was designed to protect "lawful" joint ratemaking. *Id.* at 10. From this point, Petitioners contend that Reed-Bulwinkle represented a congressional accommodation of the *same* policy considerations addressed in *Keogh*, that passage of Reed-Bulwinkle therefore eliminated the "need for" *Keogh*, and that the legislative history of Reed-Bulwinkle indicates that it "define[s] the extent of antitrust immunity." *Id.* at 18, 20 and 21. This argument amounts to a sleight of hand, as Petitioners attempt to re-define *Keogh* as the precursor of Reed-Bulwinkle so they can argue that the legislation supplanted this Court's decision.[40]

On the contrary, *Keogh* and the Reed-Bulwinkle Act are two different solutions addressed to two entirely different problems. *Keogh* does not purport to create an antitrust immunity to shield collective ratemaking *conduct;* it restricts only the application of one antitrust *remedy* to prevent direct judicial interference with ICA rate regulation. *Keogh* and *Georgia* both recognize that the underlying conduct remains fully subject to antitrust sanctions that do not involve filed rates, including criminal prosecutions and injunction actions. In short, the

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[39] Thus, unlike the situation presented in *Georgia*, the ICC has been empowered since 1948 to regulate rate bureau procedures. *See ATA*, 104 S. Ct. at 2462.

[40] The government forthrightly acknowledges that Reed-Bulwinkle did not "overrule" *Keogh*. U.S. Brief at 16.

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Keogh rule turns on the nature of the relief sought, not the substantive violation alleged.

In contrast, the issue before Congress in passing Reed-Bulwinkle was not the need to protect filed rates from judicial interference reflected in *Keogh*. Rather, as the Second Circuit's thorough analysis of the legislative history indicates, "the need for the legislation" arose from the threat to rate bureaus posed by criminal prosecutions and the injunction action permitted in the *Georgia*, not from that posed by treble damage actions, which *Keogh* and *Georgia* already had barred. H.R. Rep. No. 1100, 80th Cong., 1st Sess. 3-5 (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1845-47; S. Rep. No. 44, 80th Cong., 1st Sess. 5-6 (1947). This distinction is clear in the House and Senate reports, which are based on testimony discussing *Keogh*, including ICC Commissioner Aitchison's explanation to the Congress that *Keogh* had "remitted the shipper to the Interstate Commerce Act for any damages," but "uncertainty . . . prevails" regarding "the danger of criminal prosecution or injunction suits."[41]

The two committees that reported out the legislation were "at pains to insert the qualifying phrase" reflecting an intent to preserve, not to retreat from, the existing law, which limited shipper remedies. *Square D*, 760 F.2d at 1359, Pet. App. at 25a. The House and Senate Reports explain that, as to conduct outside the express immunity,

> [t]he bill leaves the antitrust laws to apply with full force and effect to carriers, *so far as they are now applicable.*

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[41] *Regulation of Rate Bureaus, Conferences and Associations: Hearings on H.R. 2536 Before the Senate Comm. on Interstate Commerce*, 79th Cong., 2d Sess. 1148-49 (1946) (statement of Commissioner Aitchison). In addition, two representatives of the Justice Department read passages from *Keogh*. *Id.* at 581 (statement of Mr. Wiprud, former special assistant in charge of the Antitrust Division Transportation Section); *Id.* at 799 (statement of Assistant Attorney General Berge).

S. Rep. No. 44 at 7; H.R. Rep. No. 1100 at 5, 1948 U.S. Code Cong. & Ad. News at 1848 (emphasis added). This history simply cannot be read, as Petitioners would have it, to resurrect the antitrust damage theory *Keogh* had long since barred. *See* 760 F.2d at 1356-60, Pet. App. at 19a-26a. As the Second Circuit held, "there is no basis . . . to infer that Congress intended to [overrule *Keogh*] by implication, particularly since neither the purposes nor the operation of the *Keogh* doctrine and the Reed-Bulwinkle Act conflict." 760 F.2d at 1360, Pet. App. at 26a.[42]

2. *The* Carnation *decision is not inconsistent with Keogh.*

Petitioners' reliance on *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), rests on the same false premise as their Reed-Bulwinkle argument. It assumes that *Keogh* represents a "blanket" antitrust immunity for otherwise illegal conduct, the "need for" which is governed by the presence or absence of an express immunity. As explained above, however, *Keogh* deals with protecting a statutory scheme of pervasive

[42] That the legislative history of the Motor Carrier Act of 1980 states that antitrust immunity was "a result of" Reed-Bulwinkle, Pet. Brief at 30-31, says no more about the "need for" *Keogh* than the Reed-Bulwinkle Act does—namely, nothing.

Petitioners' further contention that, in Reed-Bulwinkle, Congress contemplated only protecting "proposed" conduct and not the implementation of an agreement is both beside the point and blind to the plain language of the statute. Pet. Brief at 23-24. The immunity provision covers not just the formation of rate bureaus, but expressly includes the "carrying out" of rate bureau agreements. "Carrying-out" was intended to be subject to *post hoc* supervision by the Commission, not *ex ante* review. *See* H.R. Rep. No. 1100 at 12, 1948 U.S. Code Cong. & Ad. News at 1855. It is equally unsound to suggest that an agreement *not* to file a rate may be unlawful, Pet. Brief at 12, for if carriers can agree to charge one kind of rate with immunity, they must be able to agree *not* to charge another kind. That is the heart of collective ratemaking.

rate regulation from judicial interference, a problem unrelated to whether collective ratemaking should be immunized. Thus, as the Second Circuit found, there was no need for the Court in *Carnation* to "overrule *Keogh* or even seriously to question that decision" because there was a "sound basis . . . for distinguishing *Keogh*." 760 F.2d at 1362, Pet. App. at 31a-32a.

The basis for that distinction is the fact that, in contrast to the ICA, the Shipping Act at the time of *Carnation* did not contain the sort of regulatory mandate that would justify the rule in *Keogh* and the other filed rate cases. Congress imposed on ocean shipping a "very limited regulatory scheme" that "does not give the [Federal Maritime Commission] any mandate to regulate *rate* competition and, indeed, . . . was designed to minimize the role of the FMC in this regard." *Id.* at 1362-63, Pet. App. at 32a-34a.[43] For example, unlike the ICC, the Maritime Commission could not suspend a proposed tariff, could not prescribe a reasonable rate, and could not disapprove a rate and award reparations except in very limited circumstances. *Id.* at 1363, Pet. App. at 34a.

[43] Congress has never granted the FMC the type of pervasive rate regulation powers that it has granted to the ICC. As the Senate Commerce Committee stated in reporting the 1961 amendments to the Shipping Act:

> Whereas Congress has vested rate control powers and responsibilities in Government regulatory agencies concerned with domestic surface and air transportation, it has heretofore given to the maritime regulatory agencies no similar mandate over international shipping rates.

S. Rep. No. 860, 87th Cong., 1st Sess. 5 (1961), *reprinted in* 1961 U.S. Code Cong. & Ad. News 3108, 3112. *See also* H.R. Rep. No. 53, Part II, 98th Cong., 1st Sess. 3 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 221, 222 ("except for a seldom exercised power to disapprove rates found to be 'so unreasonably high or low as to be detrimental to the commerce of the United States' (46 U.S.C. § 817), the FMC does not possess authority to set rates in foreign commerce").

The Second Circuit's conclusion underscores not only the distinction between the *Carnation* and *Keogh* decisions, but the reason why the *Keogh* decision was a correct one:

> the pervasive authority of the ICC respecting the rates and business of carriers under its jurisdiction is absent from transportation subject to the more limited scrutiny of the FMC.

Id.

3. *The Motor Carrier Act of 1980 did not change the scheme of rate regulation, but served to create an administrative remedy for rate bureau violations that is consistent with* Keogh.

Petitioners and the Government rely on the Motor Carrier Act of 1980 to support their argument that *Keogh* should be overruled in this case. Pet. Brief at 41-44; U.S. Brief at 23-25.[44] This reliance is peculiar in that the legislation, which became effective on July 1, 1980, was law for at most a few months of the sixteen-year period involved here. *See* 760 F.2d at 1360 n.7, Pet. App. at 27a n.7 *and* U.S. Brief at 24 n.31. Indeed, Petitioners did not suggest below, and do not suggest here, that any damage claims arising out of those few months should be treated differently than the claims arising prior to the effective date of the 1980 Act. *See* 760 F.2d at 1355, Pet. App. 17a.

In addition, the 1980 Act did not disturb the scheme of rate regulation that lies at the heart of *Keogh*. The

[44] The Government also refers to legislation affecting railroads and airlines. U.S. Brief at 25 n.33. In the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress, *inter alia*, redefined the Commission's reasonableness powers over rail rates, but left unaffected the powers with respect to discriminatory rates. No comparable statutory amendment has affected ICC authority over motor carrier rates. Developments in other industries such as airlines are irrelevant to the issue of congressional intent presented by this case.

ICC today retains its historic power to control motor carrier rates, including the authority to determine whether rates are unreasonably high or low or unjustly discriminatory, as well as the authority to suspend, investigate and invalidate rates that do not comply with the ICA. 49 U.S.C. §§ 10701, 10704, 10708 (1982).[45] Nor does the 1980 Act detract from the fact that, throughout the period covered by the complaints, shippers continued to challenge rates under the ICA[46] and to seek reparations for excessive rates,[47] and the Commission continued to protect the financial health of motor carriers as necessary to the long-run public interest.[48]

[45] The 1980 Act gave greater emphasis to competition, most notably by reducing entry restrictions and eliminating collective ratemaking for single line rates as of 1984. While the 1980 Act also contained a "zone-of-rate-freedom" provision that increased carrier flexibility to raise and lower individually-made rates within certain limits, 49 U.S.C. § 10708(d) (1982), that provision applies only where a carrier specifically invokes it, has been rarely used, *Expansion of Zone of Reasonableness*, 367 I.C.C. 907, 909 (1984), and does not cover any of the rates challenged by Petitioners.

[46] *See, e.g., General Increase, New England Motor Rate Bureau, April 1985*, ICC Docket No. 39952 (Mar. 27, 1985) (ordering investigation of proposed general rate increase on the basis of shipper protests that rates would be unreasonably high); *General Increase, April 1978, S.M.C.R.C.*, 361 I.C.C. 1 (1978); *General Increase, Middle Atlantic and New England Territories*, 332 I.C.C. 820 (1969). Indeed, whether shippers protest or not, the ICC reviews every general rate increase proposed by a rate bureau, including the NFTB, under procedures requiring the submission of detailed cost justification data. *See* 49 C.F.R. § 1139 (1984).

[47] *See, e.g., United States v. Central Truck Lines, Inc.*, 548 F.2d 523 (5th Cir. 1977); *United States v. Mercury Motor Express, Inc.*, 355 I.C.C. 460, 473 (1976); *United States v. Consolidated Freightways Corp.*, 350 I.C.C. 1, 8 (1974); *United States v. Western Gillette, Inc.*, 343 I.C.C. 29, 37 (1972).

[48] *See* cases cited *supra* note 31. Moreover, in the Motor Carrier Act of 1980, Congress required the ICC to adopt standards to allow

For purposes of this case, however, there is a greater significance to the 1980 Act: it created a basis for a new administrative remedy for rate bureau violations that is potent but avoids the concerns underlying *Keogh* and the filed rate doctrine. The Court in *ATA* held that the 1980 Act allowed the Commission "to approve motor-carrier tariffs on the condition that the Commission may later nullify increases found to have been submitted in substantial violation of rate bureau agreements." *ATA*, 104 S. Ct. at 2466. Nullification of rates approved under this new condition would subject the carriers to liability for the difference between the nullified rate and the prior rate. The Court recognized that such awards were potentially "ruinous" to carriers, but took comfort in the fact that this "harsh" remedy would be administered with discretion by the ICC. *Id.* at 2468 & n.13.

The *ATA* remedy is the appropriate one for rate bureau violations such as those alleged here because it is an *ICA* remedy, and therefore is consistent with the filed rate doctrine. Under *ATA*, the ICC determines whether carriers have acted beyond the scope of an ICC-approved rate bureau agreement, and, if so, whether shippers were injured. Then, depending upon resolution of these issues, it is left to the Commission's discretion to decide if the imposition of sanctions will advance or retard the policies of the ICA. Thus, the power approved in *ATA* not only strengthens the remedies available to shippers under the ICA, but leaves the critical and traditional regulatory issues—whether to nullify the filed rate and whether to impose sanctions—precisely where Congress intended them to be, with the ICC, not the courts.[49]

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motor carriers to attain adequate revenue levels. 49 U.S.C. § 10701(e) (1982). *See* H.R. Rep. No. 1069, 96th Cong., 2d Sess. 26, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2308.

[49] Petitioners rely on *ATA* to refute the erroneous proposition, improperly attributed to Respondents, that "*Keogh* . . . immunizes

C. There are no procedural devices that can replace *Keogh*.

For sixty years, *Keogh* has fulfilled congressional intent in consistent administration of the ICA by remitting shippers to the ICC for rate challenges. Petitioners and the Government have offered no principled rationale to justify a departure from that doctrine or retroactive imposition of antitrust damage liability based on the hundreds of Respondents' rates that have been subject to pervasive regulation for so many years in the past. However, beyond the facts of this case, there remain the policy-driven arguments why *Keogh* should be overruled, including principally the notion that the conflicts that *Keogh* and the filed rate cases have prevented in the past can in the future be avoided altogether or managed through

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all activities encompassed within plaintiffs' complaint." Pet. Brief at 33. This reliance is mispiaced, for *ATA* dealt solely with the narrow issue of Commission authority to create a new remedy under the Motor Carrier Act of 1980 to enforce rate bureau agreements. 104 S. Ct. at 2460, 2462. Petitioners and the Government refer to general statements in *dicta* regarding "whatever" antitrust damages may be allowed as if the Court assumed *Keogh* had been overruled, or, without ever mentioning *Keogh*, was nevertheless overruling that decision *sub silentio*. Passing the Court's frequent citation of *Keogh* with approval in other recent decisions, *see supra* note 11, this strained reading does not square with two facts: first, in *ATA* the United States premised its policy justification for new Commission powers on the ground that, *because of Keogh*, shippers lacked adequate remedies under the antitrust laws. Reply Brief for the Petitioners, *ATA*, at 5. Second, consistent with the view propounded by the Government, the Court in *ATA* held that Congress intended "the Commission—and not the threat of antitrust liability—[to] be the primary enforcer of [rate bureau agreements]." 104 S. Ct. at 2466-67. Finally, the Court's statements about antitrust liability are limited to contexts not present here, regardless of whether those statements referred to antitrust damage claims not based on filed rates or to claims based on rates the ICC had previously nullified. In the present case, the filed rates challenged in the complaints have in no sense been nullified or otherwise invalidated by the ICC, and thus even an expansive reading of *ATA* will not resurrect Petitioners' claims.

a dual system of rate adjudication in both the agency and the courts. In urging such a change in the law, Petitioners and the Government ignore the ramifications of their drastic proposal.

a. The question of how to resolve inevitable regulatory issues in the context of an ongoing antitrust case cannot be avoided. As the courts have uniformly recognized, every antitrust damage claim based on excessive rates would require a determination that the hypothetical lower rate satisfies ICA standards. It is therefore disingenuous for Petitioners to assert that ICC expertise is not essential "because the vast majority of freight tariffs . . . become effective with no [ICC] review whatsoever," Pet. Brief at 36; the point is that here Petitioners are asking a court to award damages based upon a judicial determination of rates other than those charged by Respondents in filed tariffs, rates that would have been subject to ICA standards and to review by the Commission. Nor is it helpful for the Government to suggest that a hypothetical lower rate could fall within the "zone of reasonableness" and therefore "not violate the rate structure or infringe upon the ICC's authority," U.S. Brief at 18, for that is precisely *one* of the questions to be decided with respect to each hypothetical rate: does it fall within the zone? [50] The United States conceded in *T.I.M.E.*, 359 U.S. at 473-74, and seems to concede here, *see* U.S. Brief at 20 n.26, that courts and juries are not competent to make that

[50] The Government recognizes that the rate may be too low because it is not compensatory. U.S. Brief at 20 n.26. But even a compensatory rate within the zone may be still too low because it does not fulfill the revenue needs of carriers to which the rate would apply, or it unduly diverts traffic from competitors, or unjustly discriminates among shippers. These are issues for the Commission, not the courts. *Cf. Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-82 n.11 (1981) (the fact that a rate increase was within the ceiling established by the regulatory agency does not necessarily mean that the agency would have approved that rate if filed).

decision, which Congress remitted exclusively to the Commission; yet Petitioners' damage theory calls for just such a determination. For courts to undertake such inquiries would destroy the consistent application of ICA standards.[51]

b. The suggested referral of discrete issues to the ICC is not a solution as a matter of law. The issue is not merely one of deference to agency expertise or procedural comity, as Judge Friendly analyzed it. Rather, the issue is one of congressional intent, and the uniform holding of the Court's filed rate cases is that the ICA remedies must be exclusive where shippers claim injury and damages based on filed rates. In these circumstances, the courts simply have no role at all. *Keogh*, 260 U.S. at 162; *T.I.M.E.*, 359 U.S. at 473-74; *Arrow*, 372 U.S. at 669-671.[52]

c. The sudden and complete overhaul of a longstanding doctrine, which Petitioners and the Government propose, will result in the transfer to the courts of a host of complex rate cases once decided by the Commission. Apart from established precedent barring referral of rate issues to the ICC, the problems of consistency, certainty and procedural fairness that would arise in antitrust claims based on regulated rates are too numerous and compli-

[51] *See Mitchell Coal & Coke Co. v. Pennsylvania Railroad*, 230 U.S. 247, 255 (1913) ("If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character."). Equally clear is that this goal could not be realized if the courts and the ICC had concurrent jurisdiction, because of the possible "divergence between the action of the Commission and the decision of a court." *Abilene Cotton Oil*, 204 U.S. at 441.

[52] Indeed, at least one decision raises doubt that, outside the statutory procedures, the ICC would have any authority to consider the reasonableness of hypothetical rates even if requested to do so by a court. *See United States v. Garner*, 236 F. Supp. 632, 635 (E.D.N.C. 1964).

cated to be answered by the referral cases cited by Judge Friendly and the Government.[53] The intractable nature of these problems confirms that *Keogh's* remedy limitation remains the only sure way of vindicating congressional intent in the ICA.

1. First, creation of an antitrust damage remedy would upset the carefully-balanced scheme of carrier rights and shipper remedies crafted by Congress. *See United States v. Associated Transport, Inc.*, 505 F.2d 366, 369-70 (D.C. Cir. 1974) (for a court to permit a shipper the benefit of both statutory rights and extra-statutory remedies would be to bestow impermissibly "the best of both worlds"). The ICA directs the Commission to promote "sound economic conditions" by giving due regard to carrier revenue needs, and the ICC uses that discretion in employing the remedial provisions of the statute. 49 U.S.C. § 10101(a)(1)(1982). *See ATA*, 104 S. Ct. at 2468 & n.13.[54] A court has no such mandate under the antitrust laws. If treble damages meted out by various courts and juries were to weaken significantly or bankrupt a competitor, or cripple the industry, the Commission's ability to carry out the National Transportation Policy would be destroyed—precisely the opposite of what Congress intended.[55]

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[53] *See Square D*, 760 F.2d at 1353, Pet. App. at 11a-12a; U.S. Brief at 13. For example, referral cases involving (1) interpretation of an *existing* tariff or contract provision or (2) a *statutory* reparations proceeding under the ICA are patently irrelevant.

[54] *See also Burlington Northern Inc. v. United States*, 459 U.S. 131, 141-42 (1982).

[55] *See Bankamerica Corp. v. United States*, 462 U.S. 122, 133 (1983) (new interpretation of antitrust laws would expose individuals to "possible civil liability in unknown amounts"); *National Classification Committee v. United States*, 746 F.2d 886, 892 (D.C. Cir. 1984) (private antitrust actions could "permanently disable" carriers).

2. To determine hypothetical rates for the measurement of antitrust damages would require unprecedented speculation: courts and juries would become engaged in massive efforts to reconstruct hundreds of transportation rates over a span of many years, and then come to some conclusions concerning how the regulatory agency as constituted at various points in the past would have decided rate lawfulness issues based upon philosophy, expertise, and precedent prevailing at the time.[56] The case at bar, for instance, seeks damages for a sixteen (16) year period beginning almost twenty (20) years ago; other cases pending today seek to reach back over thirty (30)

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[56] The difficulty of such an assessment is compounded by the complexity of rate determinations, which are highly fact sensitive and include consideration of a multitude of "regulatory" factors. Among the factors considered under the ICA are:

> cost of service (car-mile costs and revenue are frequently examined in this connection); value of service (what the traffic will bear); the existence *vel non* of competition; the transportation characteristics of the commodity (weight[,] size, density; gold vs. feathers is an example often used as an illustration by rate economists; likewise sand and gravel vs. perishable fruit or vegetables); the anticipated volume of shipments; the distance of the haul; the availability of return loads in the type of equipment used; the economic status of the industry served; the rate level required in order to move the traffic; comparison of the rate under consideration with established rates for comparable shipments in the territory involved; and other pertinent considerations.

New Orleans & Lower Coast Railroad v. International Proteins Corp., 514 F. Supp. 46, 49 (E.D. La. 1981) (quoting *Westinghouse Electric Corp. v. United States*, 388 F. Supp. 1309, 1317 (W.D. Pa. 1975)). *See also Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 806 (1973) ("'The process of rate-making is . . . empiric[,] . . . fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.'") (quoting *Board of Trade v. United States*, 314 U.S. 534, 546 (1942)).

years.[57] No court or agency could apply the fact-intensive and dynamic rate standards of the Interstate Commerce Act across such vast periods of time, not just for each year, but for every sub-period in which any relevant circumstance changed, with any hope of achieving rationality, much less consistency.[58]

3. If rates were subject to antitrust damage actions, the predictability and certainty that prevails today would be replaced by uncertainty. Carriers faced with the destructive threat of treble damages would be foolhardy to charge any new collective rate until the Commission had passed on all aspects of the process by which such rates had been promulgated.[59] And once confronted with an

[57] *See Iron Ore, supra* page 10. It bears mention that both the instant case and the *Iron Ore* cases call for a far more complicated reconstitution of the rate structure than the Court found anathema in *Keogh*. *See* 260 U.S. at 164.

[58] Congress has precluded the ICC from considering rate issues beyond a reasonably contemporaneous time by imposing a two-year statute of limitations on reparations cases. 49 U.S.C. § 11706 (1982). Moreover, the ICC has been reluctant to determine rate lawfulness retroactively, even for the two-year statutory period, because the host of relevant conditions changes so rapidly. *See Baer Brothers Mercantile Co. v. Denver & Rio Grande Railroad*, 233 U.S. 479, 488 (1914); *Anadarko Cotton Oil Co. v. Atchison, Topeka & Santa Fe Railway*, 20 I.C.C. 43, 49-50 (1910).

Petitioners cite antitrust damage cases arising under other regulatory schemes, including cases brought by competitors rather than shippers, and argue that these cases involve "the selfsame issue" of damage calculation. Pet. Brief at 37-38. However, courts have viewed competitor cases as distinctly different. *See, e.g., Essential Communications Systems, Inc. v. A.T. & T.*, 610 F.2d 1114, 1121 (3d Cir. 1979). Whatever the merits of such distinctions, this legal question is currently at issue in the lower courts, *see, e.g., Pinney Dock & Transport Co. v. Penn Central Corp.*, 600 F. Supp. 859, 879, 893 (N.D. Ohio 1984), *appeal docketed*, Nos. 84-3653 and 84-3654 (6th Cir. May 21, 1984), and is not before the Court in this case.

[59] As the Seventh Circuit held in *Wheat Rail*:

> To subject the carriers to retroactive antitrust liability for rates later declared unlawful would place carriers in a position of "great uncertainty." Carriers would never be able to rely on ICC approval of rates until all appeals on initial ICC decisions had been decided. Then, if such appeals resulted in the rates being declared unlawful, the carriers would be forced to pay treble damages even though the rates had been initially approved and they had been required to charge only those rates. We do not think that it was the goal of the ICA to trap carriers into such retroactive antitrust liability for engaging in conduct required by the ICA. The imposition of antitrust liability for this conduct would only frustrate the goal of the ICA.

759 F.2d at 1315 (citation omitted).

antitrust challenge, carriers would be faced with the Hobson's choice of withdrawing rates in order to minimize damages, thus losing needed revenue, or running the risk of increasing damages during the many years of litigation.[60] In cases such as this one or the *Iron Ore* cases, the duration of the allegedly excessive rates on which the damage actions are based would make withdrawal of rates a practical impossibility.

4. It is difficult, if not impossible, to disentangle rate issues from the underlying issue of the lawfulness of the ratemaking conduct. Where, as here, the liability issue turns on the construction of the rate bureau agreement (which is an ICC order) and ICC regulations, the risk of improper interference with the statutory scheme is increased significantly. What is alleged in an antitrust case as coercion that interferes with independent action may, upon analysis by the Commission under appropriate standards, turn out to be lawful. *See Cancellation Of Intermediate Routing, Michigan Northern Railway*, 365 I.C.C. 51, 76 (1981).[61] What is alleged to be a procedure

[60] The statutorily-limited suspension period favors "allowing the carrier's rate to control pending decision by the Commission, since under the Act, the shipper may receive reparations for overpayment while the carrier can never be made whole after underpayment." *Burlington Northern*, 459 U.S. at 141-42 (citations omitted).

[61] In *Michigan Northern*, the ICC held that carriers who responded to independent action by cancelling joint rates, thereby seriously jeopardizing the viability of the independent actor, had

unauthorized by a rate bureau agreement and subject to antitrust attack may turn out to be a procedure that receives Commission approval and therefore results in no loss of immunity. *See Canned Goods from Pacific Coast to Eastern Points*, 315 I.C.C. 769, 791 (1962) *and Pacific Paper Products, Inc. v. Garrett Freight Lines, Inc.*, 351 I.C.C. 309, 320 (1975).[62] What in truth resulted from a change of law, *Terminal Warehouse*, 297 U.S. at 505, or a good faith misinterpretation of an ICC order, *Wheat Rail*, 579 F. Supp. at 523, or a change in enforcement policy, *National Classification Committee v. United States*, 746 F.2d at 892, may not justify a change in the filed rates or the imposition of sanctions. *See supra* note 13.

However, if *Keogh* were overruled, there would exist powerful incentives to avoid the Commission's expertise by converting these same cases into private treble damage actions by a simple labelling device that applied legal conclusions or allegations of "willfulness" to mixed issues of law and fact otherwise within the jurisdiction of the ICC.[63] In these circumstances, the likelihood is great

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not been unlawfully coercive but had responded legitimately to retain business.

[62] In *Canned Goods*, the Commission held that alleged collaboration " 'outside the formal rate organization structure' " was permissible because it was "preliminary" to consideration of rate proposals under the approved procedures. 315 I.C.C. at 791-92. The issue in *Canned Goods* originated in an antitrust case challenging the unauthorized ratemaking as outside the immunity, but the claim was dismissed on the ground that the issue must be resolved by the Commission. *Luckenbach Steamship Co. v. United States*, 179 F. Supp. 605 (D. Del. 1959), *aff'd in relevant part per curiam*, 364 U.S. 280 (1960).

[63] The Commission's decisions on what constitutes improper rate bureau procedure and interference with independent action belie Petitioners' repeated references throughout their brief, and even in the question presented, to "knowing" violations in this case. These contentions are not to be found in any complaint allegation, an omission which reflects the fact that Petitioners' complaints repeat the allegations of the civil complaint filed by the Department

that courts and juries would reach conclusions on liability that would differ from what the Commission would conclude. Moreover, the Commission would lose the sole discretion to determine when, if ever, a rate bureau violation should affect the lawfulness of a filed rate or produce legally cognizable damages—a power that this Court specifically recognized with approval in *ATA*, 104 S. Ct. at 2468 n.13.

* * * *

In sum, the relationship between the antitrust laws and the national transportation policy reflected in the ICA has worked precisely as Congress envisioned. Throughout the history of the Interstate Commerce Act, the ratemaking powers delegated to the Commission have remained plenary as to motor carrier rates, and the filed rate doctrine has protected the ICA's standards and remedies from judicial interference. *Keogh* and *Georgia* stand as part of that doctrine and reflect the "plain repugnancy" between the comprehensive scheme of rate regulation and the antitrust damage remedy, as this Court has repeatedly recognized. *See, e.g., United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 & n.29 (1963); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963).[64] Antitrust damage ac-

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of Justice, which was similarly silent on this point. The Antitrust Division's decision to proceed against Respondents with a civil case rather than a criminal prosecution after an eighteen-month grand jury investigation was consistent with its longstanding policy to forbear from criminal cases absent *knowing* violations of clear-cut rules. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 438-43 (1978). *See also Confirmation Hearing on William F. Baxter, Nominee, to be Assistant Attorney General—Antitrust Division, Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 12 (1981) (statement of William F. Baxter); Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 Cornell L. Rev. 405 (1978).

[64] The suggestion that *Keogh* and *Georgia* have been overtaken by the modern axiom that implied repeal is disfavored, Pet. Brief

tions based on filed rates would necessarily result in different sanctions and standards of rate lawfulness being applied, and would thereby subject carriers to inconsistent results and unpredictable procedures. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).[65] Whether labelled a "remedy limitation" or a "filed rate" doctrine, the *Keogh* and *Georgia* decisions were, and are, the correct ones.

III. IF THE LAW IS TO BE CHANGED, CONGRESS IS THE APPROPRIATE BODY TO CONSIDER THE POLICY ARGUMENTS ADVANCED HERE.

Congress, whose statutes were interpreted in *Keogh* and *Georgia*, has never uttered a word in disapproval of those decisions, despite their consistent application by the courts over time and the fact that Congress was plainly aware of them. *See Square D*, 760 F.2d at 1356-59, Pet. App. at 23a-26a. Moreover, Congress has had numerous opportunities to address *Keogh*, since it has considered transportation reform legislation several times during the past decade and has enacted five recent amendments to the ICA regulatory scheme.[66] Where Congress has

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at 10, is plainly wrong. Careful attention to this principle is reflected in this Court's 1907 *Abilene Cotton Oil* decision, cited in *Keogh*, 260 U.S. at 163, as well as in *Georgia*, 324 U.S. at 456-57.

[65] The Court in *Gordon* noted, in language equally applicable to this case, that "different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the [agency] must consider, in addition, the economic health of the . . . industry." 422 U.S. at 689.

[66] *See Square D*, 760 F.2d at 1355, Pet. App. at 15a. The acts are the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31; the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895; the Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011; the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; and the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102.

taken an active role in a field and has acquiesced in long-standing judicial interpretation of a statute, this Court's consistent policy and practice has been to adhere to precedent. *See Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721, 1726 n.18 (1985) (declining to abandon the implied antitrust immunity for state action "[a]fter over 40 years of Congressional acquiescence") *and Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) (declining to reverse prior decisions implying an immunity for baseball even in the absence of any form of economic regulation). There is no reason to depart from that principle in this case.

Even though the rate regulatory scheme has not changed in any material respect, Petitioners and the Government argue that the ICC lacks the will or the funding to carry out the responsibility over rates entrusted to it by law. In response to this political issue, the Government does not ask Congress to underwrite the Commission nor to repeal *Keogh*.[67] Rather, it invites this Court to step in, overrule its determination of what Congress has done, and authorize the federal courts to fill in for the ICC. *See* U.S. Brief at 19-20 & n.24.

However, this Court does not, and should not, so lightly depart from the principles of *stare decisis*. If established precedent on an issue of statutory interpretation is to be

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[67] In connection with the high degree of legislative activity in transportation over the past decade, the Departments of Justice and Transportation and the ICC have presented their policy views to Congress on no fewer than 114 occasions, without ever asking that *Keogh* be overruled. *See* Appendix to Supplemental Brief of Respondents in Reply to the United States as Amicus Curiae. Not until September 1985 did the Executive Branch propose legislation that would repeal all ICC regulation of the rates of motor carriers of property. *See* Supplemental Brief of Respondents Informing the Court of a Recent Legislative Proposal. If such legislation were passed, *Keogh* would be a dead letter in the motor carrier field. Regardless of the fate of that legislation, however, the Government remains free to ask Congress to consider *Keogh* specifically.

changed after sixty years of consistent application by the courts, Congress has the "superior institutional competence" to gauge the impact of the change and to give proper weight to the wide-ranging political, social and economic consequences of such a policy reversal. *See Patsy v. Board of Regents*, 457 U.S. 496, 513-15 (1982) (refusing to overrule a prior statutory decision on the ground that legislation was the proper remedy). *See also id.* at 517 (White, J., concurring) (to overrule a statutory case, "a particularly strong showing is required that we have misread the relevant statute and its "history").

A retroactive reversal of the long-established remedy limitation in *Keogh* would raise a myriad of difficult political issues. For example, would a mere technical violation of a rate bureau agreement subject a carrier to the severe penalty of antitrust treble damages?[68] Should there be a phase-in period to allow carriers a period of adjustment and education, as Congress has provided in statutes such as the Motor Carrier Act of 1980?[69] Should the filed rate doctrine be overturned across all regulated industries? And would the new treble damage penalty be applied retroactively to carriers that acted long before the administration's change in attitude?

Resolution of such policy issues requires the type of political compromise, balancing and fine-tuning that are the traditional functions of the legislative branch, for sound reasons. As the Court noted in *Patsy*: "These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying,

[68] Under this Court's decision in *ATA*, the appropriate remedy for the violation of a rate bureau agreement depends on the severity of the violation, among other factors, and is left to the discretion of the ICC. 104 S. Ct. at 2466-68.

[69] That Act eliminated antitrust immunity for single-line rates, but set an effective date four years in the future. 49 U.S.C. § 10706(b)(3)(D) (1982). *See also Square D*, 760 F.2d at 1360 n.7, Pet. App. at 27a n.7.

and court-burdening litigation if answered incrementally by the judiciary . . . ." 457 U.S. at 514. If there are to be policy-driven changes in *Keogh* and the filed rate doctrine, these changes should be made by the political branch that has the governmental capacity to harmonize the interests and equities at stake.[70]

[70] As one court stated:

> The Department of Justice may well be dissatisfied with the balance drawn by Congress between competition and other aspects of the public interest. However, the remedy is not to seek judicial reinterpretation of statutory language . . . , but to seek from Congress amendment of the . . . statutory charter.

United States v. Civil Aeronautics Board, 511 F.2d 1315, 1323 (D.C. Cir. 1975). *Cf. Bankamerica Corp. v. United States*, 462 U.S. 122, 133 (1983) ("If changes in economic factors or considerations of public policy counsel the extension of the Clayton Act to the categories of interlocking directorates implicated here, it is a simple matter for Congress to say so clearly.").

CONCLUSION

Over sixty years of settled law precludes Petitioners' damage claims. *Keogh* and *Georgia* should not be overruled. If the historic accommodation between two statutory schemes is to be reconsidered, Congress is the proper body to balance the wide ranging political, social and economic consequences of such a change. This Court should affirm the decision below.

BRYCE REA, JR.
DONALD E. CROSS
REA, CROSS & AUCHINCLOSS
1 Thomas Circle, N.W.
Washington, D.C. 20005
(202) 785-3700

SANFORD M. LITVACK
DONOVAN, LEISURE, NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Attorneys for Respondent Niagara Frontier Tariff Bureau, Inc.

LESTER M. BRIDGEMAN
LOUIS E. EMERY
BRIDGEMAN & URBANCZYK
1112 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 429-9223

Attorneys for Respondent Inter-City Truck Lines (CANADA), Inc.

PETER D. STANDISH
JOEL B. HARRIS
PHILIP A. BYLER
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Respondent TNT Canada, Inc.

DONALD L. FLEXNER *
WM. RANDOLPH SMITH
CLIFTON S. ELGARTEN
PETER K. LEVINE
CAROL L. HEE
CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-5800

Attorneys for Respondent Dominion-Consolidated Truck Lines Ltd.

PETER A. GREENE
CHARLES L. FREED
THOMPSON, HINE AND FLORY
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800

Attorneys for Respondent ICL International Carriers, Ltd.

JOHN W. BRYANT
EAMES, WILCOX, MASTEJ & BRYANT
900 Guardian Building
Detroit, Michigan 48226
(313) 963-3750

Attorneys for Respondent Bondy Cartage, Ltd.

* Counsel of Record

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APPENDIX A

The following statement amends the Rule 28.1 information contained in Appendix A to Respondents' Joint Brief in Opposition to the *certiorari* petition.

1. Bondy Cartage Limited is a wholly-owned subsidiary of Henry T. Bondy Holdings Limited, and is affiliated with Bondy Freight Lines, Inc. and Bondy Transfer, Inc.

2. Dominion-Consolidated Truck Lines Limited has changed its name to McCallum Transport Limited and Dominion-Consolidated Holdings Limited has changed its name to McCallum Holdings Limited.

3. As of December 30, 1985, Inter-City Truck Lines (CANADA), Inc. ("Inter-City") is a wholly-owned subsidiary of N.M. Davis Corp., Ltd. of Ontario, Canada. Inter-City owns 100% of the stock of Trans-Canada Truck Lines, Inc. However Inter-City anticipates that, in January 1986, pursuant to approval given by the Interstate Commerce Commission and Canadian authorities, 100% of the stock of Inter-City will be acquired by 141622 Canada, Inc., a wholly-owned subsidiary of Reimer Express Enterprises Ltd. of Winnipeg, Manitoba, Canada. Reimer Express Enterprises Ltd. also owns 90% of the stock of Reimer Express Lines, Ltd. and of Jamesville Enterprises Ltd., which owns 100% of the stock of Canadian Great Western Express Ltd.

APPENDIX B

STATUTE INVOLVED (1966—JULY 1980)

There are three versions of the Interstate Commerce Act ("ICA") provisions governing motor carrier rates that have been in effect during the 1966-1981 time period covered by the complaints. First, the statute as it existed from 1966 until 1978 was codified at 49 U.S.C. § 1 *et seq.* and was most recently included in the 1976 edition of the United States Code. The second is the recodified version of the statute, which Congress enacted *"without substantive change"* in 1978. Pub. L. No. 95-473, 92 Stat. 1337 (1978) (emphasis added). The third relevant version incorporated the substantive amendments of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, which were effective as of July 1, 1980 and are codified in the 1982 edition of 49 U.S.C.

This Appendix B excerpts from the 1982 code those provisions of the ICA that governed motor carrier rates *prior* to the 1980 amendments. Since the 1982 code used here and in the brief reflects the 1978 recodification, the provisions reproduced below differ significantly in organization and language from the statute as it was codified prior to 1978, but, as noted, Congress intended *no substantive change* in the recodification. In addition, it should be noted that there are some minor variations in numbering and language between the 1978 recodification and the 1982 version used here that resulted from subsequent amendments. However, the provisions set forth below reflect the *substance* of the statute as it related to motor carrier rates during the period 1966 to July 1980.

Those provisions that were substantively amended by the 1980 Act are designated by an asterisk, and the post-1980 version is reproduced in Appendix C.

The following excerpts from the 1982 version of 49 U.S.C. are relevant to the 1966-July 1980 time period:

§ 10101. Transportation policy [formerly preceding 49 U.S.C. § 1 (1976)]*

(a) . . . to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and—

(1) in regulating those modes—

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

* * * *

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

§ 10701. Standards for rates, classifications, through routes, rules and practices [formerly 49 U.S.C. § 316(b), (d) (1976)]*

(a) A rate, . . . classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier (including a rail carrier) must be reasonable. Divisions of joint rates by those carriers (including rail carriers) must be made without unreasonable discrimination against a participating carrier and must be reasonable.

* * * *

§ 10704. Authority and criteria: rates and classifications, rules, and practices prescribed by Interstate Commerce Commission [formerly 49 U.S.C. § 316(e), (i) (1976)]

(b) (1) When the Commission decides that a rate charged or collected by—

(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

* * * *

or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed.

(2) (A) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier, the Commission shall consider, among other factors, the effect of the prescribed rate, classification, rule, or practice on the movement of traffic by that carrier.

* * * *

(3) If the carrier is a motor or water common carrier or a freight forwarder, the Commission shall also consider the need, in the public interest, of adequate and efficient transportation or service by that carrier at the lowest cost consistent with providing that transportation or service.

(4) If the carrier is a motor common carrier or a freight forwarder, the Commission shall also consider the inherent advantages of transportation by motor common carrier or the inherent nature of freight forwarding, respectively.

* * * *

(d) In a proceeding involving competition between carriers of different modes of transportation subject to this subtitle, except rail carriers, the Commission, in determining whether a rate is less than a reasonable minimum rate, shall consider the facts and circumstances involved in moving the traffic by the mode of carrier to which the rate is applicable. Subject to the transportation policy of section 10101 of this title, rates of a carrier may not be maintained at a particular level to protect the traffic of another mode of transportation.

* * * *

(f) The Commission may begin a proceeding under this section on its own initiative or on complaint. A complaint under subsection (a) of this section must be made under section 11701 of this title, but the proceeding may also be an extension of a complaint pending before the Commission. A complaint

under subsection (c) of this section must contain a full statement of the facts and the reasons for the complaint and must be made under oath.

* * * * *

§ 10706. Rate agreements: exemption from antitrust laws [formerly 49 U.S.C. § 5b (1976)]*

* * * * *

(b)(2) As provided by this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Comission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

* * * * *

(f) The Commission may review an agreement approved under subsection (a), (b), or (c) of this section and shall change the conditions of approval or terminate it when necessary to comply with (1) the public interest and subsection (a), or (2) subsection (b) or (c). The Commission shall postpone the effective date of a change of an agreement under this subsection for whatever period it determines to be reasonably necessary to avoid unreasonable hardship.

(g) The Commission may begin a proceeding under this section on its own initiative or on application. Action of the Commission under this section (1) approving an agreement, (2) denying, ending, or changing approval, (3) prescribing the conditions on which approval is granted, or (4) changing those conditions, has effect only as related to application of the antitrust laws referred to in subsection (a), (b), or (c) of this section.

* * * * *

§ 10708. Investigation and suspension of new non-rail carrier rates, classifications, rules, and practices [formerly 49 U.S.C. §§ 15(7), 316(g) (1976)]

(a)(1) The Interstate Commerce Commission may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule, or practice immediately, on its own initiative or on application of an interested party when—

(A) a new individual or joint rate or individual or joint classification, rule, or practice affecting a rate is filed with the Commission by a common carrier, other than a rail carrier, under this subtitle; or

(B) a new reduced rate or rule or practice that causes a reduction of a rate is filed with

the Commission by a contract carrier under this subtitle.

(2) The Commission must give reasonable notice before beginning a proceeding under this section but may act without allowing an interested carrier to file an answer or other formal pleading in response to its decision to begin the proceeding. The Commission may take whatever final action on a rate, classification, rule, or practice under this section, after a full hearing (whether completed before or after the rate, classification, rule, or practice goes into effect), as it could in a proceeding begun after a rate, classification, rule, or practice became effective.

(b) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice at any time for not more than 7 months beyond the time it would otherwise go into effect by (1) delivering to each affected carrier, and (2) filing with the proposed rate, classification, rule, or practice, a statement of reasons for the suspension. If the Commission does not take final action during the suspension period, the proposed rate, classification, rule, or practice is effective at the end of that period. However, if an increase in a rate for, or related to, transportation of property by an express, sleeping car, or pipeline carrier becomes effective under this subsection, the Commission may require the interested carrier to account for all amounts received under it and specify by whom and on whose behalf those amounts were paid. When the Commission takes final action, it may require the carrier to refund, with interest, to the persons on whose behalf those amounts were paid, the part of the increased rate found to be in violation of this subtitle.

(c) In a proceeding under this section, the burden is on the carrier proposing the changed rate, classification, rule, or practice to prove that the change is reasonable. The Commission shall give proceedings under this section preference over all other proceedings related to that type of carrier pending before it and make its decision at the earliest practical time.

* * * *

§ 10741. Prohibitions against discrimination by common carriers [formerly 49 U.S.C. §§ 3(1), 316(d) (1976)]

* * * *

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

* * * *

§ 10761. Transportation prohibited without tariff [formerly 49 U.S.C. § 317(b) (1976)]

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allow-

ing the use of a facility that affects the value of that transportation or service, or another device.

* * * *

§ 10762. General tariff requirements [formerly 49 U.S.C. §§ 317(a)-(c), 318(a) (1976)]

* * * *

(a) (1) . . . A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs.

* * * *

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

* * * *

(c) (1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice the carrier shall publish, file, and keep open for public

inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

* * * *

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. . . . [A] proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under subsections (a) and (b) of this section.

* * * *

§ 11701. General authority [formerly 49 U.S.C. §§ 13(1), 304(c), 316(e) (1976)]

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier or broker is violating this subtitle, the Commission shall take appropriate action to compel compliance with this subtitle. The Commission may take that action only after giving the carrier or broker notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action.

* * * *

§ 11705. Rights and remedies of persons injured by certain carriers [formerly 49 U.S.C. §§ 9, 16, 304a (1976)]

* * * *

(b) (1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title.

* * * *

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c) (1) . . . A person may begin a proceeding under section 10704 or 10705 of this title to enforce liability under subsection (b) (3) of this section by filing a complaint with the Commission under section 11707(b) of this title.

* * * *

§ 11706. Limitation on actions by and against common carriers [formerly 49 U.S.C. § 304a (1976)]

* * * *

(c) (2) A person must begin a civil action to recover damages under section 11705(b) (3) of this title within 2 years after the claim accrues.

* * * *

§ 11903. Rate, discrimination, and tariff violations [formerly 49 U.S.C. § 41(1) (1976)]

(a) A person that knowingly offers, grants, gives, solicits, accepts, or receives by any means

transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (1) at less than the rate in effect under chapter 107 of this title, or (2) by practicing discrimination, shall be fined at least $1,000 but no more than $20,000, imprisoned for not more than 2 years, or both.

(b) A carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title or an officer, director, receiver, trustee, lessee, agent, or employee of a corporation that is subject to the jurisdiction of the Commission under that chapter, that willfully does not file and publish its rates or tariffs as required under chapter 107 of this title or observe those tariffs until changed under law, shall be fined at least $1,000 but no more than $20,000, imprisoned for not more than 2 years, or both.

* * * *

APPENDIX C

STATUTE INVOLVED (JULY 1980—PRESENT)

This Appendix C contains the relevant provisions of the Interstate Commerce Act that were amended by the Motor Carrier Act of 1980, as set forth in the 1982 Code. Except as set forth here, all of the provisions reproduced in Appendix B remained in effect after July 1980.

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and—

(1) in regulating those modes—

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

(2) in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (C) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system; and (I) promote intermodal transportation . . . .

* * * *

§ 10701. Standards for rates, classifications, through routes, rules, and practices

* * * *

(e) In proceedings to determine the reasonableness of rate levels for a motor carrier or group of motor carriers, or in proceedings to determine the reasonableness of a territorial rate structure where rates are proposed through agreements authorized by section 10706(b) of this title, the Commission shall authorize revenue levels that are adequate under honest, economical, and efficient management to cover total operating expenses, including the opera-

tion of leased equipment and depreciation, plus a reasonable profit. The standards and procedures adopted by the Commission under this subsection shall allow the carriers to achieve revenue levels that will provide a flow of net income, plus depreciation, adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, attract and retain capital in amounts adequate to provide a sound motor carrier transportation system in the United States, and take into account reasonable estimated or foreseeable future costs.

* * * *

§ 10706. Rate agreements: exemption from antitrust laws

* * * *

(b)(1) In this subsection, "single-line rate" refers to a rate, charge, or allowance proposed by a single motor common carrier that is applicable only over its line and for which the transportation can be provided by that carrier.

(2) As provided by this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

* * * *

(3)(D) No agreement approved under this subsection may provide for discussion of or voting upon single-line rates on or after January 1, 1984, except that such date shall be July 1, 1984, if the Motor Carrier Ratemaking Study Commission does not submit its final report under section 14(b)(4) of the Motor Carrier Act of 1980 on or before January 1, 1983.

* * * *

(e) The Commission may require an organization established or continued under an agreement approved under this section to maintain records and submit reports. The Commission, or its delegate, may inspect a record maintained under this section.

(f) The Commission may review an agreement approved under subsection (a), (b), or (c) of this section and shall change the conditions of approval or terminate it when necessary to comply with (1) the public interest and subsection (a), or (2) subsection (b) or (c). The Commission shall postpone the effective date of a change of an agreement under this subsection for whatever period it determines to be reasonably necessary to avoid unreasonable hardship.

(g) The Commission may begin a proceeding under this section on its own initiative or on application. Action of the Commission under this section (1) approving an agreement, (2) denying, ending, or changing approval, (3) prescribing the conditions on which approval is granted, or (4) changing those conditions, has effect only as related to application of the antitrust laws referred to in subsection (a), (b), or (c) of this section.

* * * *